ZAINAL ABIDIN MOHAMED

v.

ROSLAN ABDUL AZIZ & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL SUIT NO: S2-22-389-1997]
9 JUNE 2003

LAND LAW: *Indefeasibility of title and interests - Fraud and negligence - Allegation of - Whether proven - Whether necessary steps taken by second defendant to ensure first defendant capable of executing charge on property in its favour - Failure to physically inspect or conduct a valuation report - Whether tantamount to negligence - Failure to bring claim within statutory exceptions under s. 340(2) of National Land Code - Whether plaintiff can impeach the indefeasibility of a registered interest - Whether second defendant's charge on property valid and prima facie indefeasible*

LAND LAW: *Charge - Setting aside - Indefeasibility of interest - Fraud and negligence - Allegation of - Whether proven - Whether necessary steps taken by second defendant as chargee to ensure first defendant capable of executing charge on property in its favour - Physical inspection and conduction of valuation report - Whether a legal requirement - Whether failure to do so would tantamount to negligence - Failure to bring claim within statutory exceptions under s. 340(2) of National Land Code - Whether plaintiff can impeach the indefeasibility of registered interest - Whether second defendant's charge on property valid*

The plaintiff purchased a double storey terrace house ('the property') and paid a deposit of 10% of the purchase price of the said property to the vendor and the balance to be settled through a loan obtained under the name of the first defendant with his full knowledge and consent. The plaintiff had taken possession and occupied the said property from the date of purchase. Sometime in March 1997, the first defendant had charged the said property in favour of the second defendant for a term loan of RM180,000 and overdraft facility of RM80,000 granted by the second defendant to the first defendant. The plaintiff had no knowledge of this. Subsequently, the first defendant failed to honour his obligations in respect of the term loan and overdraft facility with the second defendant. The second defendant then applied for an order for sale of the said property pursuant to its right as a chargee. The said property was accordingly sold by public auction.

The plaintiff contended that the first defendant was holding the said property as a trustee for and on behalf of the plaintiff. As a trustee, the first defendant had no right to create a charge over the said property in favour of the second defendant, hence the charge created was null and void and of no effect. Further, the plaintiff contended that the second defendant was negligent in accepting the said property as security for loan granted to the first defendant without inspecting physically the property prior to the approval or disbursement of the said loan to the first defendant. Hence, the second defendant was clearly in default of its obligation as a banker and chargee and was guilty of unreasonable conduct by not inspecting the said property as aforesaid. The plaintiff prayed for, *inter alia*, a declaration that the first defendant held the said property on trust for the plaintiff and for the second defendant's charge over the said property be cancelled or set aside.

The court proceeded with the hearing of the case in the absence of the first defendant but with the presence of the second defendant.

Held:

[1] The plaintiff had not shown that the second defendant was a party or privy to any fraudulent act in accepting the said property to be charged as security for the loan granted to the first defendant. The first defendant may or may not have acted fraudulently, but unless the second defendant was a party or privy to such fraud, clearly s. 340(2) of the National Land Code (NLC) was not applicable. (p 141 b)

[2] The plaintiff had not claimed that there was dishonesty on the part of the second defendant, let alone proved any such claim. The second defendant was also not aware of any fact which showed that the plaintiff was the beneficial owner of the said property. Before registering the charge, the second defendant had conducted a title search at the Land Office and this did not show any encumbrance or private caveat lodged against the said property. There was nothing to put the second defendant on enquiring that the plaintiff had a claim over the said property, or that the first defendant was a trustee for any third party. The second defendant had taken all necessary steps to ensure that the first defendant was capable of executing a charge on the said property in its favour. In any event, mere knowledge of a chargee about an unregistered interest on the land does not amount to fraud. (pp 141 g-i & 142 a)

[3] Failure on the part of the second defendant to physically inspect or to conduct a valuation report on the said property does not tantamount to negligence. There is no legal requirement requiring such an inspection as a pre-requisite to granting a loan or taking a charge. (p 145 c-d)

[4] Indefeasibility of title and interest can only be attacked to the extent permitted by the NLC. If a party fails to bring his claim within the statutory exceptions, he cannot impeach the indefeasibility of a registered interest. The court was satisfied that the second defendant's charge on the said property was valid and *prima facie* indefeasible. (pp 144 a & 146 b)

[5] However, the plaintiff has succeeded in making a case against the first defendant and therefore he was liable to the plaintiff. Reliefs granted in favour of the plaintiff as against the first defendant must be without prejudice to the second defendant's interest as registered chargee. Under the circumstances, the plaintiff was entitled for an order under prayer (a) and to damages to be assessed against the first defendant under prayer (h). To facilitate an order for damages against the first defendant, the plaintiff was also entitled for an order under prayer (e). (p 148 c-d)

[Ordered accordingly.]

Case(s) referred to:

Hiew Min Chung v. Borneo Housing Mortgage Finance Bhd & Ors [2000] 8 CLJ 165 HC ***(refd)***

Kheng Soon Finance Bhd v. MK Ratnam Holdings Bhd [1983] 2 MLJ 384 ***(dist)***

Lai Soon Cheong v. Kien Loong Housing Development Sdn Bhd [1993] 2 CLJ 199 HC ***(refd)***

Lian Keow Sdn Bhd (in liquidation) v. Overseas Credit Finance (M) Sdn Bhd [1988] 2 MLJ 449 ***(refd)***

OCBC Bank (M) Bhd v. Lee Lee Fah [2000] 1 CLJ 71 CA ***(refd)***

Tai Lee Finance Co Sdn Bhd v. Official Assignee [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(refd)***

Teh Bee v. K Moruthamuthu [1977] 2 MLJ 7 ***(refd)***

Legislation referred to:

National Land Code, ss. 253(3), 340(i), (2), (3)

Rules of the Court 1980, O. 18 r. 12(1), O. 35 r. 2

For the plaintiff - Abdul Latiff Ahmad; M/s Abdul Latiff Ahmad & Co

For the 2nd defendant - Subarna Paul; M/s Yeap & Yeap

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali J:

In this action, the plaintiff prays for, *inter alia*, a declaration that the 1st defendant holds the land held under Geran 12188, Lot 18437, Mukim Setapak, Daerah Kuala Lumpur, Wilayah Persekutuan (the said property) on trust for the plaintiff. As against the 2nd defendant, the plaintiff's prayer is for the 2nd defendant's charge over the said property be cancelled or set aside and for the 2nd defendant to discharge the charge and deliver the original issue document of title and discharge of charge to the plaintiff. In the alternative, the plaintiff prays for damages. The details of the plaintiff's claims are as follows:

(a) A declaration that the 1st defendant held the said property as trustee for the plaintiff.

(b) An order that the 1st defendant executes a transfer of the said property to the plaintiff.

(c) An order that the 1st defendant delivers the transfer and the original issue document of title to the plaintiff's solicitors.

(d) An order that the senior assistant registrar executes the transfer if the 1st defendant fails to do so.

(e) An order that the 1st defendant delivers vouchers for royalty deductions and fees.

(f) An order that the 1st defendant co-operates with the plaintiff to obtain a loan.

(g) An order that the 2nd defendant's charge be set aside and the 2nd defendant to discharge the charge and forward the title and discharge of charge to the plaintiff.

(h) In the alternative, damages.

Fact Of The Case

The plaintiff bought the said property, being a double storey terrace house, in the name of the 1st defendant with the knowledge and consent of the 1st defendant. The plaintiff, at all material times, was and still is a singer and the 1st defendant was the manager for the plaintiff through his company known as Roslan Aziz Production Sdn. Bhd. For that purpose, both the plaintiff and the 1st defendant (through Roslan Aziz Production Sdn. Bhd.) signed an "Artiste Management Agreement" dated 1 November 1989. The 1st defendant then requested the plaintiff to shift and stay in the said property which the plaintiff

did. Initially, the plaintiff paid rental to the owner of the said property named Shamsul Rijal bin Mohd Yusof. About six-seven months later the 1st defendant suggested that the plaintiff should buy (instead of renting) the house. The plaintiff agreed. The owner also agreed. Due to uncertain financial position of the plaintiff at that material times, both the plaintiff and the 1st defendant agreed to the following arrangements:

(a) the said house was to be purchased in the name of the 1st defendant for and on behalf of the plaintiff;

(b) the 1st defendant was to apply for a loan facility from a financial institution for the purpose of the purchase;

(c) all payments and instalments involved were to be paid by the plaintiff through the 1st defendant, by way of deductions from the royalties and commissions payable to the plaintiff under the Artiste Management Agreement;

(d) the 1st defendant agreed and undertook to transfer the said property to the plaintiff once the plaintiff's financial standing is sound and the plaintiff is in a position to obtain a loan under his own name.

In accordance with the above arrangements, the plaintiff paid the deposit being 10% of the purchase price of the said property to the vendor and the balance of the purchase price was to be settled through a loan obtained from AMFB under the name of the 1st defendant with the full knowledge and consent of the 1st defendant. The plaintiff also paid all the necessary legal fees, disbursement and all outgoings in respect of the transaction including payment for the assessment and quit rent payable to the land office and DBKL in respect of the said property. Subsequent to that, the plaintiff paid for the monthly instalments of RM1,144 (per month) for the loan obtained, without fail. The plaintiff has taken possession and occupied (and still occupies) the said property from the date of the purchase. The plaintiff had also renovated the said property with his own money.

Sometime in March 1997, the 1st defendant had charged the said property in favour of the 2nd defendant for a term loan of RM180,000 and overdraft facility of RM80,000 granted by the 2nd defendant to the 1st defendant.

The plaintiff has no knowledge about the said charge. The said charge was duly registered at the Wilayah Persekutuan Land Office on 5 June 1997. It is not disputed that at the time of the registration of the charge, there was no encumbrances endorsed or private caveat lodged over the said property.

The 1st defendant failed to honour his obligations in respect of the term loan and overdraft facility with the 2nd defendant. The 2nd defendant then applied to the Kuala Lumpur High Court (*vide* OS No: S1-24-987-98) for an order for sale of the said property pursuant to its rights as a chargee. The plaintiff then applied to intervene in the foreclosure proceedings but his application was dismissed. The Kuala Lumpur High Court granted an order for sale on 2 March 2000. In the meantime the plaintiff lodged his private caveat on 22 July 1999 in respect of the said property (well after the registration of the 2nd defendant's charge). Subsequently the 2nd defendant applied to the Kuala Lumpur High Court (*vide* OS No: S2-24-156-2000) for an order removing the said private caveat and obtained an order for the removal of the caveat on 17 January 2001. There has been no appeal against any of the said order. The said property was accordingly sold by public auction on 13 August 2002 to one Gan Ban San for RM316,000. The said purchaser has paid the balance of the purchase price into court.

Plaintiff's Contention

As against the 1st defendant, the plaintiff contended that the 1st defendant was holding the said property as a trustee for and on behalf of the plaintiff. As a trustee, the 1st defendant has no right to create a charge over the said property infavour of the 2nd defendant. According to the plaintiff the charge over the said property was created without his knowledge and consent. In other words, the plaintiff contended, the 1st defendant has no legal capacity to create the charge as he was merely a trustee. The plaintiff further contended that the charge created was null and void and of no effect.

As against the 2nd defendant, the plaintiff contended that the 2nd defendant was negligent in accepting the said property offered by the 1st defendant as security for the loan granted to the 1st defendant without inspecting physically the property prior to the approval or disbursement of the said loan to the 1st defendant. The plaintiff further contended that the 2nd defendant was clearly in default of its obligation as a banker and chargee-to-be and was guilty of unreasonable conduct by not inspecting the said property as aforesaid. In addition, the plaintiff also contended that the 2nd defendant was in breach of the terms and conditions of it's Housing Loan Scheme – ie, para. 17 of the Standard Terms and Condition Covering Banking Facility Granted by Standard Chartered Bank Malaysia Berhad, wherein the plaintiff contended that the said paragraph clearly states that the 2nd defendant is required to inspect the said property.

Case Against The 1st Defendant

The charge on the said property in favour of the 2nd defendant was created by the 1st defendant without the knowledge and consent of the plaintiff. As a trustee, where the plaintiff is the beneficial owner, the 1st defendant has no right and no legal capacity to create the said charge on the said property.

In his statement of defence, the 1st defendant disputed the plaintiff's claim against him. Further, the 1st defendant filed his counter-claim against the plaintiff, *inter alia*, for the arrears in rental of the said property for a sum of RM5,700 and vacant possession.

Initially the 1st defendant was represented by a solicitor. However, on 3 March 2003, the said solicitor was discharged by an order of the court on the ground that the 1st defendant failed to respond to their letters requesting the 1st defendant to come to their office to discuss and to get instructions over the case. It was also noted that the solicitor had notified the 1st defendant about the hearing date. The 1st defendant failed to turn up for the hearing on 17 March 2003. No new solicitor appeared on his behalf. No witnesses were called to support his defence and counter-claim. No one knew why the 1st defendant failed to attend the hearing. Therefore, in exercise of the powers under O. 35 r. 2, RHC 1980, the court proceeded with the hearing of the case in the absence of the 1st defendant (but with the presence of the 2nd defendant).

Case Against The 2nd Defendant

The sole basis of the plaintiff's claim against the 2nd defendant is that the 2nd defendant was negligent in accepting a charge over the said property as security for a loan granted to the 1st defendant without first inspecting the said property physically to determine whether there was any encumbrances on the said property. The 2nd defendant denied that it was negligent. The contentions of the 2nd defendant are, *inter alia*, as follows:

a) Upon the registration of its charge, the 2nd defendant's interest as chargee is indefeasible except under certain statutory exceptions.

b) The plaintiff has failed to bring his claim within any of these statutory exceptions.

c) Negligence is not a ground for setting aside the indefeasibility of a charge.

d) Even if negligence was such a ground, there was in fact no negligence on the part of the 2nd defendant.

Findings Of The Court

As against the 1st defendant, the court has not hesitation to dismiss his counter-claim against the plaintiff on the ground that he failed to attend the hearing in court. As for the plaintiff's claim against the 1st defendant, there is no evidence at all to support the 1st defendant's defence as appeared in his statement of defence. There is also no attempt to dispute the plaintiff's evidence given in court by the 1st defendant. Therefore, it is only proper that the court will determine the plaintiff's claim against the 1st defendant at the end of the trial, after hearing the plaintiff's case as well as the 2nd defendant's case. The court is in no position to grant any order for the plaintiff as against the 1st defendant at the initial stage of the proceedings (ie, before the conclusion of the trial) because some of the prayers (against the 1st defendant) may adversely affect the interest of the 2nd defendant who is the chargee on the said property.

As against the 2nd defendant, the issue to be determined by the court is whether the charge on the said property was validly and legally created in accordance with the relevant provisions of the National Land Code (NLC). In other words, it must be determined whether the 2nd defendant's interest on the charge over the said property is indefeasible except under certain statutory exceptions. It must also be determined whether the plaintiff's claim comes under any of these statutory exceptions; whether negligence on the part of the 2nd defendant as chargee (as alleged by the plaintiff) is a valid ground for setting aside the indefeasibility of a charge. Even if negligence is a ground to set aside the charge, whether there was in fact any evidence of negligence on the part of the 2nd defendant in accepting the said charge.

Indefeasibility Of Interest

The relevant provisions relating to this issue under the National Land Code 1965 (NLC) is section 340 (i) which provides:

> The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall subject to the following provisions of this section is indefeasible.

Section 340(2) of the NLC further provides:

> The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by and written law.

The purpose of these provisions are to protect innocent parties. This was set out by the Court of Appeal in *OCBC Bank (M) Bhd. v. Lee Lee Fah* [2000] 1 CLJ 71 where one of the issues to be determined was whether the bank (OCBC), as an innocent party, should be deprived of its right as registered chargee in the circumstances stimulated in s. 340(2) of the NLC. It was held by the Court of Appeal that:

> As for the bank, they are an innocent party and they are therefore protected by s. 340(1) of the National Land Code 1965. Their interest as chargee is indefeasible unless there are evidence to their knowledge that there was fraud or misrepresentation or where the registration of the charge was obtained by forgery or where the title or interest was unlawfully acquired. There are no such evidence adduced.

In the present case, the plaintiff seeks to set aside the 2nd defendant's charge. To do so, he must satisfy the court that the 2nd defendant's registered interest in the said property is defeasible. It is not disputed that the 2nd defendant was duly registered as chargee over the said property. The charge was registered under Charge Presentation No: 8125/97 dated 5 June 1997. It is for the plaintiff to satisfy the court that it can invoke one of the statutory exceptions upon the fact of the present case. It is also apparent that negligence, which is the mainstay of the plaintiff's claim against the 2nd defendant, is not stated to be one of the statutory exceptions under s. 340(2) of the NLC.

The plaintiff has not, either in his pleadings nor in his evidence in court, suggested that any of the exceptions to indefeasibility under s. 340(2) of the NLC applies in the present case. On reading s. 340(2) of the NLC, it is clear that the only or nearest conceivable attack on the indefeasibility of the 2nd defendant's charge would be under para. (a) thereof ie, "in any case of fraud ... to which the person or body ... was a party or privy."

With respect to these provisions, it would be necessary for the plaintiff to prove that:

(a) there is fraud involved; and

(b) the 2nd defendant was a party or privy to the fraud.

In the present case, the plaintiff has not shown that the 2nd defendant was a party or privy to any fraudulent act in accepting the said property to be charged as security for the loan granted to the 1st defendant. The 1st defendant may or may not have acted fraudulently, but unless the 2nd defendant was a party or privy to such fraud, clearly s. 340(2) is not applicable. The plaintiff has not suggested that the 2nd defendant had acted fraudulently or knew of any fraud in the transaction. The particulars of fraud must be specifically pleaded. Order 18 r. 12(1) RHC clearly provides:

> Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including ... (a) particulars of any ... fraud ... on which the party relies.

In the present case, the plaintiff has not pleaded fraud as against the 2nd defendant. The plaintiff has also failed to prove any evidence of fraud (in his evidence in court) as against the 2nd defendant.

What is the meaning of 'fraud' under the NLC?

In a Supreme Court case of *Lian Keow Sdn. Bhd. (In liquidation) v. Overseas Credit Finance (M) Sdn. Bhd.* [1988] 2 MLJ 449, Syed Agil Barakbah SCJ defined 'fraud' in the following terms:

> Fraud under the Code means actual and not constructive or equitable fraud. Actual fraud must be proved in order to deprive a purchaser for value of the absolute title conferred by the Code. Actual fraud means dishonesty of some sort proved against the person whose registered title is impeached, or his agents. *Bona fide* mistake or negligence is not fraud and each case must depend on its own particular circumstances.

The plaintiff has not claimed that there was any dishonesty on the part of the 2nd defendant, let alone proved any such claim. The 2nd defendant was also not aware of any fact which showed that the plaintiff was the beneficial owner of the said property. Before registering the charge, the 2nd defendant had conducted a title search at the land office and this did not show any encumbrance or private caveat lodged against the said property. DW1 also said there was nothing to put the 2nd defendant on enquiring that the plaintiff had a claim over the said property. The said charge was registered on 5 June 1997 while the plaintiff only lodged his private caveat on the said property on 22 July 1999 (ie, more than two years after the charge was registered).

In any event, mere knowledge of a chargee about an unregistered interest on the land does not amount to fraud.

In another Federal Court case of *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387, Abdul Hamid FJ, held that fraud under s. 340 of the NLC "must be actual fraud and mere knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud within the meaning envisaged by s. 340."

His Lordship further held:

> The principle underlying the provision of our National Land Code particularly on the effect of registration affecting the title or interest of a registered proprietor is basically similar to that set out in *Waimiha Sawmilling Company Limited v. Waione Timber Company, Limited* at page 106 cited from a passage in the Court of Appeal case of *Fels v. Knowles* at page 620 as follows:
>
> The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world.
>
> Moving closer to home, our courts in *Doshi v. Yeoh Tiong Lay* held that "the doctrine of constructive notice is inapplicable to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration and the Court will not readily apply the doctrine where the effect would be to invalidate a transaction in relation to the sale of land.

The plaintiff alleged that the 2nd defendant had been negligent in accepting a charge over the said property. The court will deal later with the question of whether, on the facts of this case, there was any negligence on the part of the 2nd defendant, but a preliminary point is to determine whether even if negligence is proved, it would amount to fraud so as to bring the plaintiff's claims within the exception under s. 340(2) of the NLC.

The precise answer to the issue is that negligence is not fraud. This has been said by Syed Agil Barakbah SCJ in *Lian Keow Sdn. Bhd. (In liquidation (supra))* that "a *bona fide* mistake or negligence is not fraud and each case must depend on its own particular circumstances."

In *Lai Soon Cheong v. Kien Loong Housing Development Sdn. Bhd.* [1993] 2 CLJ 199, a purchaser agreed to purchase a shophouse from a developer. It was a condition of the agreement that the developer should not create any further encumbrances without the purchaser's approval. The developer charged the property to a bank without the knowledge of the purchaser. The developer defaulted in the repayment of the loan to the bank and the bank commenced foreclosure proceedings and obtained an order for sale. The purchaser later lodged a private caveat. The purchaser applied for an injunction to restrain the bank from selling the property and for its charge to be declared null and void and the order for sale set aside.

The bank pleaded that at the time of the registration of the charge, there were no encumbrances over the property. Further, the purchaser had not registered his interest over the property nor lodged a private caveat. The bank said it had not knowledge of the sale and purchase agreement between the purchaser and the developer.

On the facts of that case, Lim Beng Choon J held that there was no duty on a bank to ensure there was no sale of subdivided lots by a developer before it could accept a charge over the land. More pertinently to the present case, the learned judge also held that even if the bank was negligent in not carrying out further enquiries, negligence *per se* does not and cannot amount to fraud:

> Upon a careful review of the facts and circumstances of the present case, the most that can be said against the (bank) was that they have been negligent in not carrying out further enquiries. But negligence *per se* does not and cannot amount to fraud.

The onus is upon the plaintiff to prove any fraud. In *Tai Lee Finance* case *(supra)* the Federal Court has ruled that:

> The onus is upon the person alleging fraud to prove fraud not on a balance of probabilities but beyond reasonable doubt.

This principle was followed by Richard Malanjum J (now JCA) in *Hiew Min Chung v. Borneo Housing Mortgage Finance Bhd. & Ors.* [2000] 8 CLJ 165.

Based on the above authorities, the court has no hesitation to rule that negligence cannot amount to fraud. The next issue is whether negligence, in and of itself, (even though not amount to fraud), entitle the plaintiff to set aside the charge? In other words, can a registered interest be rendered defeasible outside the scope of the statutory exceptions in s. 340(2) of the NLC, and in particular, is negligence such a ground for setting aside the registered interest?

The court is of the view that the NLC is a comprehensive code, and the indefeasibility of title or interest can only be attacked to the extent permitted by the NLC. If a party fails to bring his claim within the statutory exceptions, he cannot impeach the indefeasibility of a registered interest. The plaintiff has not cited any authority to support the contention that a duly registered charge can be set aside simply on the basis of the chargee's negligence. In his submissions, the plaintiff's counsel referred to the case of *Kheng Soon Finance Bhd. v. M.K. Ratnam Holdings Bhd.* [1983] 2 MLJ 384. With respects, the court finds that the case submitted is irrelevant to the matter at hand for the following reasons:

(a) *Kheng Soon Finance* was concerned with an application by a chargee for an order for sale, not with an application by a third party (the plaintiff in the present case) to set aside a charge;

(b) In deciding whether to grant an order for sale, the court decided on the basis of whether, as required by s. 253(3) of the NLC, there was a "cause to the contrary". The question in the present case is not whether there was a "cause to the contrary" against the granting of an order for sale, but whether the plaintiff's claims of negligence by the 2nd defendant entitles him to have the charge set aside, that is, to render the 2nd defendant's interest defeasible.

Therefore, the court is satisfied that *Kheng Soon Finance* case is of no help to the plaintiff in the present case and the court holds that negligence in or of itself is not a ground for setting aside a charge. Even if the court holds otherwise ie, negligence in or of itself, is a ground for setting aside a charge, there was, in the present case, no proof or evidence to show negligence on the part of the 2nd defendant in registering the charge on the said property. In this case the 2nd defendant had conducted a search of the title at the relevant land office prior to the release of the banking facilities to the 1st defendant. Such a search did not reveal any encumbrances endorsed or private caveat lodged by the plaintiff, or any body. The search also revealed that the 1st defendant was registered as proprietor of the said property. There was nothing to put the 2nd defendant on enquiry that the 1st defendant was a trustee for any third party. In other words, the 2nd defendant has taken all necessary steps to ensure that the 1st defendant was capable of executing a charge on the said property in its favour. It is to be remembered that our system of land law is based on the Torrens System where, as proclaimed in *Fels v. Knowles* (as cited in by the Federal Court in *Tai Lee Finance* case *(supra)*, the "cardinal principle of the statute is that the register is everything." Everyone wishing to deal with

a property should be entitled to rely on what the register tells them. Ali Ag CJ in another Federal Court case of *Teh Bee v. K. Moruthamuthu* [1977] 2 MLJ 7, in his *dicta* said:

> Under the Torrens System the register is everything.

S.K. Das in his book on the Torrens System in Malaya (at p. 102), had also said the same thing – ie, "under the Torrens System the register is everything."

In essence, the plaintiff's claim that the 2nd defendant was negligent rests on the basis that the 2nd defendant did not physically inspect the said property or conduct a valuation report on the said property. With respect, the court is of the view that failure on the part of the 2nd defendant to physically inspect the said property or to conduct a valuation report on the said property does not tantamount to negligence. With regards to physical inspection, the court holds that there is no legal requirement requiring such inspection as a pre-requisite to granting a loan or taking a charge. With respect to the making of a valuation report, the court is satisfied that failure to obtain a valuation report before accepting a charge does not amount to negligence on the part of the chargee. A valuation report basically is made to enable a lender to determine the value of the property and therefore to decide the amount of money it is willing to lend against the security of the property. Generally, it is not made to find out if there are many persons holding unregistered interest on the property. Valuation reports are not expected to contain any information regarding any claims made by the occupants and valuers are not qualified to pass any opinions on the matter. Therefore, even if a valuation report has been made in the present case, it is highly unlikely that the 2nd defendant would have come to know of the plaintiff's claims to the said property.

More importantly, the plaintiff has failed to establish, based on clear authorities, that in law it is a duty of a prospective chargee under the NLC to conduct physical inspection or to obtain valuation reports in respect of the property in question before accepting the charge and that failure to do so amounts to negligence.

The plaintiff's counsel has also referred to the 2nd defendant's letter of offer "Standard Terms and Conditions Covering Banking Facilities Granted by Standard Chartered Bank Malaysia Berhad", in which by para. 17 thereof, the 2nd defendant was entitled to inspect and value the said property. The simple answer to this is that no doubt the 2nd defendant had a right to do so, but its decision not to make a valuation on the property would not amount to negligence. In other words, a decision not to exercise such right or entitlement does not, *ipso facto,* lead to the conclusion that the 2nd defendant is negligence.

The issue of negligence would have to be decided on the basis of whether there was a duty in law to carry out such inspection and valuation, and this has been answered above in the negative.

On the above considerations and authorities, the court is satisfied that the 2nd defendant's charge on the said property registered *vide* Charge Presentation No: 8125/97 on 5 June 1997 is valid and *prima facie* indefeasible and the plaintiff has failed to satisfy the court that any of the statutory exceptions under s. 340(2) of the NLC applies.

Nature Of Relief To Be Granted

At the end of the hearing, the court finds that the plaintiff has made out a case against the 1st defendant but not the 2nd defendant. Then it would be necessary to consider the nature of the relief to be granted in this case.

In the present case, the plaintiff claims, *inter alia*, the following reliefs:

(a) A declaration that the 1st defendant held the said property as trustee for the plaintiff.

(b) An order that the 1st defendant executes a transfer of the said property to the plaintiff.

(c) An order that the 1st defendant delivers the transfer and the original issue document of title to the plaintiff's solicitors.

(d) An order that the senior assistant registrar executes the transfer if the 1st defendant fails to do so.

(e) An order that the 1st defendant delivers vouchers for royalty deductions and fees.

(f) An order that the 1st defendant co-operates with the plaintiff to obtain a loan.

(g) An order that the 2nd defendant's charge be set aside and the 2nd defendant to discharge the charge and forward the title and discharge of charge to the plaintiff.

(h) In the alternative, damages.

The court finds guidance from the orders made in *Lai Soon Cheong* case cited earlier. To very briefly recite the facts of that case: a purchaser agreed to purchase a shophouse from a developer. It was a condition of the agreement that the developer should not create any further encumbrance without the purchaser's approval. The developer charged the property to a bank without the knowledge of the purchaser. The developer defaulted in the repayment of the loan to the bank and the bank commenced foreclosure proceedings and obtained an order for sale. The purchaser later lodged a private caveat. The purchaser applied for an injunction to restrain the bank from selling the property and for its charge to be declared null and void and the order for sale set aside. As stated above, the court held that there was no fraud on the part of the bank. The developer failed to enter an appearance and the court gave judgment to the purchaser in favour of the purchaser. However the learned judge did not grant the purchaser's prayers for an order for specific performance of the sale and purchase agreement as against the developer nor an injunction against the developer from selling or otherwise dealing with the property "since the said property has already been charged to the (bank) who had already obtained order of court to sell the same". Instead the court only granted the purchaser damages against the developer.

In the present case, whilst only prayers (g) and (h) directly concern the 2nd defendant, it is clear that certain of the other reliefs, particularly prayers (b), (c) and (d), if granted against the 1st defendant, would adversely affect the rights and interest of the 2nd defendant as chargee. Therefore, the court finds that it is inappropriate to grant those orders (prayers (b), (c) and (d) against the 1st defendant, even though the 1st defendant has failed to attend court for trial.

Whatever order made or reliefs granted in favour of the plaintiff as against the 1st defendant must be without prejudice to the 2nd defendant's interest as registered chargee and it's right to sell the said property pursuant to the order for sale made by the court on 2 March 2000 *vide* Kuala Lumpur High Court 05 No: S1-24-987-98; and to the rights acquired by the purchaser one Gan Bon San in good faith and for valuable consideration at the public auction held on 13 August 2002. The purchaser at the public auction has fully paid the purchase price and being a purchaser in good faith and for valuable consideration, his title to the said property is indefeasible irrespective of whether the 2nd defendant's title is indefeasible or not. This is clearly stated under s. 340(3) of the NLC which provides:

> Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2), ... it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred ... Provided that nothing in this sub-section shall affect any title or interest acquired by any purchase in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

By reason of the 2nd defendant's legal interest in the said property and the fact that the said property has already been sold to a third party, the court finds that no order can be made under prayers (b), (c) and (d).

The court is satisfied that the plaintiff has made a case against the 1st defendant and therefore the 1st defendant is liable to the plaintiff. Under the circumstances of the case, the plaintiff would be entitled for an order under prayer (a) and to damages to be assessed against the 1st defendant under prayer (h). To facilitate the order for damages against the 1st defendant, the plaintiff is also entitled for an order under prayer (e).

Conclusion

On the above considerations, the court makes the following orders:

(a) a declaration that the 1st defendant held the said property as trustee for the plaintiff;

(b) that the 1st defendant delivers vouchers for royalty deductions and fees;

(c) that the 1st defendant pay damages to the plaintiff (to be assessed), as claimed under 29 (h) of the amended statement of claim;

(d) costs against the 1st defendant;

(e) the 1st defendant's counter-claim against the plaintiff is dismissed with costs;

(f) the plaintiff's claim against the 2nd defendant is dismissed with costs.